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No. 80 - 5392

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT HOWE, SR., Petitioner

V.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, et al., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE, AND BRIEF, AMICUS CURIAE, ON BEHALF OF FAMILIES & FRIENDS OF PRISONERS, INC.; CRIMINAL JUSTICE PROGRAM OF THE NEW ENGLAND REGIONAL OFFICE OF THE AMERICAN FRIENDS SERVICE COMMITTEE; AND MASSACHUSETTS STATE SENATOR JACK H. BACKMAN.

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SUPREME COURT OF THE UNITED STATES

ROBERT HOWE, SR., Petitioner	)	
V.	)	No.80-5392
WILLIAM FRENCH SMITH, et al., Respondent	)	

MOTION FOR LEAVE TO
FILE BRIEF, AMICUS CURIAE

Families & Friends of Prisoners, Inc.; the Criminal Justice Program of the New England Regional Office of the American Friends Service Committee; and Massachusetts State Senator Jack H. Backman hereby respectfully move for leave to file the attached brief, amicus curiae, supporting the position of the petitioner and urging reversal of the decision below.

Both the petitioner Howe and the Solicitor General have granted consent; but the Vermont Attorney General has refused.

Families & Friends of Prisoners, Inc. is a non-profit Massachusetts cor-

poration organized to provide support to, and to further the interests of, prisoners and those who have friends or relatives in prison. The Criminal Justice Program is a staff and membership unit of AFSC which seeks to secure the right of prisoners to fair and humane treatment. Senator Backman, who has had a long-time interest in prison issues, is the Senate Chairman of the Joint Committee on Human Services and Elderly Affairs, which has jurisdiction of legislation affecting state prisons in the Commonwealth of Massachusetts.

Based on proposed amici's counsel's reading of the opinion below (625 F.2d 454), his conversations with counsel for the petitioner and the letter he received from counsel for the State of Vermont refusing to consent to the filing of such a brief, the proposed amici believe that the only facts before the Court will be those relating to petitioner Howe's own interstate transfer, and that the sole issue of law presented by the parties will be one of statutory construction.

The proposed amici have watched with

acute concern the growth in Massachusetts of the practice of shipping prisoners into the federal system, apparently without substantive standards as to who should be shipped and wholly without procedural protections of any kind. They believe this Court should not decide this case, which brings this "shipout" policy before the Court for the first time, without being made aware of the horrendous facts of shipouts and having a chance to consider the practice in light of its historical precursors and the Eighth Amendment ban against cruel and unusual punishment, as well as the Fourteenth Amendment's protections of both family integrity and a prisoner's access to the courts. The proffered brief sets forth some of the facts and makes a brief argument on the constitutional issues.

Accordingly, the proposed amici urge that Court grant leave to file the within brief.

Respectfully submitted,

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TABLE OF CONTENTS

Table of Authorities iii

Summary of Argument 1

I. Introduction and Statement of Interest of Amici . . . 4

II. Facts 6

III. Argument 18

A. INVOLUNTARY INTERSTATE TRANSFER OF A STATE PRISONER TO FEDERAL PRISON IS CRUEL AND UNUSUAL PUNISHMENT AND VIOLATES THE EIGHTH AMENDMENT . . 18

B. INVOLUNTARY INTERSTATE TRANSFER OF A STATE PRISONER TO A FEDERAL PRISON, WITHOUT AFFORDING HIM PROCEDURAL SAFEGUARDS AND A DEMONSTRATION OF A COMPELLING STATE INTEREST, VIOLATES THE FOURTEENTH AMENDMENT. 26

1. Family Integrity 26

a. A prisoner has a fundamental liberty interest in maintaining reasonable contact with his family . . . 26

b. A prisoner may not be deprived of his fundamental interest in family contact without

being afforded procedural due process. 31

c. At a pre-transfer due process hearing there must be a demonstration of a compelling state interest. 37

2. Access to Courts 40

a. A prisoner has a fundamental liberty interest in access to the courts. 40

b. A prisoner may not be deprived of such access without a due process hearing and a demonstration of a compelling state interest. 42

IV. Conclusion 44

Appendix A 45

Appendix B 55

TABLE OF AUTHORITIES

Pages

Cases

Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973) 40,41

Agron v. Montayne, 392 F.Supp. 454 (W.D.N.Y. 1975) 30

Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1950) . . 36

Avi v. Gibson, 483 F.Supp. 1102 (D.V.I. 1979) 30

Bounds v. Smith, 430 U.S. 817 (1977). 2,40, 42

Duchesne v. Sugarman, 566 F.2d. 817 (2d Cir. 1977). 28

Ex Parte Hull, 312 U.S. 546 (1941). . 41

Ex Parte Scarborough, 76 Cal. App. 2d 648, 173 P.2d 825 (1916) 25

Gomes v. Travisano, 490 F.2d 1209 (1st Cir. 1974) 24

Gregg v. Georgia, 428 U.S. 153 (1976) 25

Griswold v. Connecticut, 381 U.S. 479 (1965). 28,39

Johnson v. Avery, 393 U.S. 483 (1969) 41

Pages

Laaman v. Helgemoe, 437 F.Supp. 269 (D.N.H. 1977) 29

Leis v. Flynt, 439 U.S. 438 (1979). . 17

Loving v. Virginia, 388 U.S. 1(1967). 28

Mabra v. Schmidt, 356 F. Supp. 620 (W.D.Wis. 1973) 30

Meachum v. Fano, 427 U.S. 215 (1976). 7,33

Meyer v. Nebraska, 262 U.S. 390 (1923). 26, 27

Montayne v. Haymes, 427 U.S. 236 (1976). 33

Moore v. East Cleveland, 431 U.S. 494 (1977) 28

Morrissey v. Brewer, 408 U.S. 471 (1972) 37

Parham v. J.R., 442 U.S. 584 (1979) . 27

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 26, 27

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 27

Prince v. Massachusetts, 321 U.S. 158 (1944) 27

Procunier v. Martinez, 416 U.S. 396 (1974). 2,32,38,41

Pages

Quilloin v. Walcott, 434 U.S. 246 (1978) 31

Ramos v. Lamm, 485 F.Supp. 122 (D.Col. 1979). 13,29

Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y. 1974). 30

Roe v. Wade, 413 U.S. 113 (1973) . . .39

Sisbarro v. Warden, 592 F.2d. 1 (1st Cir. 1979). 7, 8

Stanley v. Illinois, 405 U.S. 645 (1972) 2,27,28,31

State v. Doughtie, 237 N.C. 368 (1953) 24

Trop v. Dulles, 356 U.S. 86 (1958) 1,24,25

Vice v. Harvey, 458 F.Supp. 1031 (D.S.C. 1978). 23

Vitek v. Jones, 445 U.S. 480 (1980) 2,32,33,34, 43

Weems v. United States, 217 U.S. 349 (1910) 18

Wisconsin v. Yoder, 406 U.S. 205 (1972) 27

Pages

Statutes and Regulations

English Habeas Corpus Act of of 1679, 31 Car.II, c. 2 . 19,20, App.B

18 U.S.C.A §5003 (1952) 6

28 C.F.R. §540.40 (1980). 12

Ariz. Rev. Stat. Ann. §31-472 (1956). 22

Ark. Stat. Ann. §43-2607 (1977) . . . 22

Cal. Penal Code §2911 (West Supp. 1970-1979). 22

Del. Laws, c. 4 §10 (1793). 21

Ga. Const. of 1877, Art. I, §2-118 (1976). 22

Digest of the Laws of Georgia, 1700-1796 20

Ill. Rev. Stat. c. 65 §29 (Smith-Hurd 1959). 22

Kan. Stat. Ann. §21-4609 (1974) . . . 22

Kan. Const. of 1859, Bill of Rights §12 (1972). 22

Laws of Maine 1822, c. 64 §11 21

Md. Ann. Code, Art. 27 §618 (1976). . 23

Laws of Md. c. 126 §5 (1809). 21

Mass. General Laws, Chapter 125, Appendix (New England Interstate Corrections Compact). 9

Pages

Mass. Revised Statutes, c. 111 §32 (1836) 21

Mass. Acts and Resolves of 1784, c. 72 §§9 and 10 21

Neb. Const. Art. I §15 23

Laws of New Jersey, 1795 21

N.Y. Laws of 1787, c. 39 21

N.C. Revised Laws, 1821. 20

N.D. Cent. Cod §32-22-36 (1976). . . .23

Ohio Const., Art. I §12. 23

Ohio Rev. Code Ann. §2725.25 23

Pa. General Laws, c. 73 §12 (1785) . .21

Act. Laws of R.I., 1798. 21

S.C. Code §17-13-120 (1977). 23

S.C.,Public Laws, 330 (1712) 20

S.D. Codified Laws Ann. §24-2-1; §24-2-25; §24-1-5; §24-6-4; §24-6-6 (1979) 23

Act. Vermont Laws 1814, c. 7 §25 . . .21

Laws of Virginia, c. 53 §7 (1792). . .21

W. Va. Const. Art. III §5. 23

Pages

Other Materials

A.B.A. Code of Professional Responsibility (1977) E.C.2-32. . . .16

A.B.A. Standards for Criminal Justice, Legal Status of Prisoners (Ch.23, Adopted as A.B.A. Policy, February 1981) 13

H. Barnes and N. Teeter, New Horizons in Criminology (2d ed.) (1959). . . .20

Hon. Warren E. Burger, Annual Address to A.B.A. (1981). 30

A. Carpenter, Habeas Corpus in the Colonies, 8 Am. Hist. Rev. 18 (1902).19

Friedman and Esseltyn, Adjustment of Children of Jail Inmates, 29 FED. PROB. 55 (Dec. 1975) 12

D. Glaser, Effectiveness of a Prison and Parole System (1964). 11

E. Goffman, Asylums (1961). 15

J. Goldstein et al., Beyond the Best Interest of the Child (1973) . .12

R. Hinde, The British Penal System, (1951). 20

J. Hoffman, On Prisoners and Parenting: Preserving the Tie That Binds, 87 YALE L.J. 1408 (1978) 12

N. Holt and D. Miller, Explorations in Inmate Family Relationships (California Department of Corrections Report No.46, 1972) 11

Pages

W. Johnson, English Prison Hulks (1957) 20

R. Ohlin, The Stability and Validity of Parole Experience Tables (Ph.D. thesis; University of Chicago, 1954). 11

D. Rothman, Discovery of the Asylum (1971) 21

Schwartz and Weintraub, The Prisoner's Wife: A Study in Crisis, 38 FED. PROB. 20 (Dec. 1974) 12

U.S. Department of Justice, Federal Prison System: Inmate Legal Service, (General Counsel, No.1315.3. July 16, 1979, Attachment 1: Law Library Materials) 17

S.B. Willson, Factual Findings & Analysis Relating to Survey of Massachusetts State Prisoners Shipped to Other State and Federal Prisons During Calendar Year 1980 (Staff Report to State Senator Jack H. Backman, Joint Committee on Human Services & Elderly Affairs, Commonwealth of Massachusetts, 1981). 8

F. H. Wines, Punishment and Reformation: A Study of the Penitentiary System (1910). 20,21

SUMMARY OF ARGUMENT

A. Amici contend that shipping a state prisoner against his will across state lines into the federal system is cruel and unusual punishment prohibited by the Eighth Amendment. The analysis looks to not only the actual practice and effect of such shipouts but also the pre-Revolutionary English and American experience with what was then known as "Transportation." Starting with the English Habeas Corpus Act of 1679, exiling of convicts beyond the jurisdiction of the sentencing court was prohibited, and these prohibitions were mirrored in the colonial statutes and finally in some constitutional provisions as the colonies and territories became states. Many states still have such anti-transport passages in their law. Accordingly, amici argue that the "evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles, 356 U.S. 86, 101) had, by the mid-19th century, eliminated an obnoxious and cruel

practice which only recently has emerged again in our justice system.

B. Amici argue as well that forced shipouts of state prisoners into the federal system offends the due process clause of the Fourteenth Amendment in two respects. First, a shipout separates a prisoner from his family -- and the family from the prisoner -- thus fracturing the residuum of family integrity which conviction and imprisonment have left them. Amici argue (relying principally on Stanley v. Illinois, 405 U.S. 645, Procunier v. Martinez, 416 U.S. 396, and Vitek v. Jones, 45 U.S. 480) that this cannot be done constitutionally without affording the prisoner procedural safeguards and a demonstration of a compelling state interest.

Second, amici point to the horrendous effects that an interstate shipout can have on a prisoner's right of access to the courts (Bounds v. Smith, 430 U.S. 817) and urge that if the practice is not invalidated altogether, it be at least circumscribed by procedural due process and a showing of a compelling

state need for transfer in the particular case.

In conclusion, amici urge that the decision below be reversed and that involuntary interstate transfer of prisoners into the federal system be held unconstitutional; or, in the alternative, that the decision below be vacated and the case remanded to the Second Circuit for full consideration of the constitutional issues involved.

I. Introduction and Statement of Interest of Amici

This amicus curiae brief, supporting the position of petitioner Howe, urging reversal of the court below, is filed on behalf of Families & Friends of Prisoners, Inc., the Criminal Justice Program of the New England Regional Office of the American Friends Service Committee and Massachusetts State Senator Jack H. Backman.

Families & Friends of Prisoners, Inc. is a non-profit Massachusetts corporation organized to provide support to, and to further the interests of, prisoners and those who have friends or relatives in prison. The Criminal Justice Program is a staff and membership unit of AFSC which seeks to secure the right of prisoners to fair and humane treatment. Senator Backman, who has had a long-time interest in prison issues, is the Senate Chairman of the Joint Committee on Human Services and Elderly Affairs, which has jurisdiction of legislation affecting state prisons in the Commonwealth of Massachusetts.

This case presents the first opportunity for the Supreme Court to consider the practice of involuntary transfer of state prisoners to geographically remote federal prisons. The practice presents serious problems, factually and legally, not raised by a transfer of an inmate to another prison within the same state and is of acute concern to the amici.

They have seen the practice used in Massachusetts with greater frequency over recent years. It is a practice which has a devastating impact on the transferred inmate as well as on the family he leaves behind. In amici's view, grave constitutional questions are posed by the transfer of state prisoners to federal prisons, questions which we believe will not be raised in the briefs of the parties but which we think merit the attention of this Court in its consideration of the present case.

II. Facts

Petitioner Robert Howe was transferred to federal prison several months after his conviction for murder in a Vermont State court. The transfer was carried out in accordance with the terms of a contract entered into between the State of Vermont and the United States. The contract is of the sort authorized by 18 U.S.C.A. §5003 which provides in relevant part:

> "(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided that any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved."

Although the Vermont Department of Corrections conducted an administrative hearing prior to the transfer, at no time did the Department or the Federal Bureau of Prisons make a determination that Howe was in need of treatment which could only be provided within the federal

system. The facts of the present case only vaguely suggest the potential for abuse and human suffering that exists when prison officials have unbridled discretion to exile state prisoners to federal prison. In Massachusetts that potential has become a reality.

In 1979, the Court of Appeals for the First Circuit in Sisbarro v. Warden, 592 F.2d 1 (1st Cir. 1979), held that prison officials need not provide notice or a hearing to state prisoners prior to a transfer to federal prison.[1/]

1/ The court held that the discretion of prison officials to transfer inmates to federal prisons or to facilites operated by other New England states, was in no way limited by the language of section 5003 or by other relevant state legislation. The court concluded that since discretion was unlimited the inmate had no right to procedural protection, relying on Meachum v. Fano, 427 U.S. 215 (1976).

The court observed that out-of-state transfer might well result in "substantial interference with communication and visitation, and that [the inmate's] access to legal materials and lawyers of the state in which he was convicted may be diminished" but nonetheless concluded that for purposes of due process analysis, there is no distinction between interstate and intrastate transfer. 592 F.2d, at 3. The amici agree with the observation, but not the conclusion.

During the period since the First Circuit decision in Sisbarro, transfers of Massachusetts inmates to remote federal prisons have occurred with disturbing frequency. These transfers have been carried out without giving the affected individuals notice, hearing or even an explanation for the action taken.

The above information comes from a staff report received by one of the amici, Senator Backman, from his assistant, S. Brian Willson, in early February 1981. The report is attached to this brief as Appendix A, and is referred to hereafter as simply the "Willson Report."

Senator Backman directed a Human Services Committee staff inquiry into the prisoner shipouts as a result of being contacted by the wives and parents of a number of the transferred prisoners who had been unable to obtain adequate information from the Massachusetts Department of Correction and who were concerned that the transfers were politically motivated. Senator Backman's staff distributed questionnaires to recently transferred prisoners and prepared a report for the Committee based

on their responses.

The results of the survey are alarming in that they strongly suggest that the transfers have been consciously used by prison officials to sabotage pending litigation against the Department.

Of the nineteen men[2] surveyed, thirteen had civil lawsuits pending against the Department. A fourteenth was in the process of drafting a complaint at the time of transfer. The Willson Report suggests that since the transfers were apparently not carried out for legitimate security[3] or disciplinary purposes,[4] they were used by prison officials to silence their most active and vocal in-prison critics. It does

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[2] Three of the 19 prisoners surveyed had been transferred to prisons in other states under the New England Interstate Corrections Compact. Mass. General Laws, Chapter 125, Appendix.

[3] Walpole prison, from which all the inmates were transferred, is a high security facility, yet just before transfer, 11 of the 19 men were in <u>minimum</u> security blocks.

[4] Seven of the 19 men had not received disciplinary 'tickets' for alleged rule violations during the six months prior to the transfer and virtually all of the tickets of those who did were for minor non-violent infractions.

not take much imagination to appreciate the chilling effect of the State's practice on the exercise of protected rights by those who remain in the state prison. Having witnessed the expulsion of inmates who posed neither disciplinary nor security problems, but who openly challenged prison practice, prisoners must find themselves confronted with a Hobson's choice: either they forego any efforts to vindicate their rights or they risk being exiled to a distant prison, far removed from relevant lawyers or law books, family or friends.

The relevant professional literature shows that such separation has a destructive, alienating and anti-rehabilitative effect on the transferees and can impose great hardship on the prisoners' families. Transfer has generally terminated any meaningful contact between the prisoner and his wife and children. The cost of transportation and lodging needed to visit the inmate has effectively placed him beyond the reach of his family.

The anti-rehabilitative effects of forced separation from the family are

substantial and well documented. A number of social scientists have studied the effect of family contact on parole success. The results are remarkably consistent and clearly establish that inmates who maintain family ties while in prison have a far greater chance of remaining out of prison after their release.[5/]

The wives and children of the transferred inmates also suffer substantial psychological harm. While the exact nature of the adverse effects on an inmate's child may vary with age, forced separation may result in significant

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[5/] D. Glaser, Effectiveness of a Prison and Parole System at 366 (1964). The study showed that 71% of those with active family contact were successful on parole compared to 50% who were successful without such prelease contact.

N. Holt and D. Miller, Explorations in Inmate Family Relationships (California Department of Corrections, Report No. 46, 1972). Seventy percent of those with 3 or more regular visitors were successful on parole. Those without visitors were six times more likely to re-enter prison during the first year of parole.

R. Ohlin, The Stability and Validity of Parole Experience Tables (Ph.D. thesis; University of Chicago, 1954). Of those who maintained active family contact while in prison 75% were successful on parole compared to 34% of those who did not.

emotional distress, poor social and psychological adjustment, diminished academic achievement and destruction of the parent-child bond.[6] Already strained by incarceration,[7] the marital relationship may often not be able to weather the destructive impact of an involuntary and indefinite separation.

The findings of these authors are reflected in both Bureau of Prison policy[8] and in the recommendations and standards of various organizations concerned

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[6] J. Goldstein et. al., Beyond the Best Interest of the Child, 31-34 (1973); J. Hoffman, On Prisoners and Parenting: Preserving the Tie That Binds, 87 YALE L.J. 1408, 1416-18 (1978). See also Friedman and Esseltyn, Adjustment of Children of Jail Inmates, 29 FED. PROB. 55 (Dec. 1975).

[7] See generally, Schwartz and Weintraub, The Prisoner's Wife: A Study in Crisis, 38 FED. PROB. 20, 21-24 (Dec. 1974).

[8] "The Bureau of Prisons encourages visiting by family, friends and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members in the community ." 28 C.F.R. §540.40 (1980).

with the criminal justice system.[9] As one federal judge has recently noted:

> "Virtually every statement on visitation from the American Correctional Association Manual to the State Association of Correctional Administrators (1972), every national study (e.g. the National Advisory Commission on Criminal Justice Standards & Goals) and every major textbook on corrections stresses the critical nature of visitation both in terms of the reduction of tension inside the prison and the facilitation of the ultimate rehabilitation of the prisoners by strengthening his ties with the 'free world' . . ." Ramos v. Lamm, 485 F. Supp. 122, 150 n.15 (D.Col. 1979).

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[9] See e.g. A.B.A. Standards for Criminal Justice, Legal Status of Prisoners (Ch. 23, Adopted as A.B.A. policy, February 1981).

"(a) Home furlough programs should be established...to enable prisoners to maintain and strengthen family and community ties.

(b)...[c]orrectional authorities should accommodate and encourage visiting by establishing reasonable visiting hours including time on weekends and holidays suited to the convenience of visitors.

(c)...Extended visits between prisoners and their families in suitable accommodations should be allowed for persons who are not receiving home furlough.

The Commentary notes that "[b]ecause almost all inmates will be returned to the community at the expiration of their terms, it is important to preserve wherever possible family and community ties."

Certainly, transfer also necessitates termination of the inmate's constructive involvement with any religious, educational, vocational, and therapeutic programs operating at the sending institution. Therapeutic relationships with the inmate's counselor and other staff members as well as long-standing friendships with other inmates come to an abrupt end. In short, whatever support system the inmate had established to help him survive the alienating and dehumanizing prison experience comes crashing down around him.

When he arrives at the federal prison he understandably brings a certain bitterness that cannot be expected to promote rehabilitation. He is thrust into a wholly new and unfamiliar environment which might well place him in serious personal jeopardy. It is generally accepted that the first months of incarceration constitute the most dangerous period for a prisoner. Until he is integrated into the new prison sub-society he is a tempting target for would-be extortionists, rapists and other institutional predators. It is as if he is being plunged into prison for the very first time and once again must suffer

the threats and humiliations of "the 'welcome', where staff, inmates or both go out of their way to give the recruit a clear notion of his plight."[10]

The changes transfer brings about in the inmate's personal life are accompanied by equally debilitating changes in his legal status. With his transfer to federal prison, he loses the opportunity to earn 'good-time' typically offered by State correction systems, and along with it the possibility of an earlier release.

The transferred inmate is severely disadvantaged with respect to parole determinations, because of the nature of the factors considered. His geographic isolation makes it impossible to interview with potential employers or vocational training programs. As noted, it also diminishes the possibility that he will have a stable home situation to return to. Both factors are of critical importance since a stable living situation and an occupational program are generally pre-requisites to a favorable

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[10] E. Goffman, Asylums, 14, 18-19 (1961).

parole determination.

The transferred inmate's ability to petition his State government for redress of grievances is also severely diminished. State officials cannot be expected to maintain an active interest in what is happening in a remote federal prison.

Significant also is the extent to which the transferred inmate loses access to the state courts with exclusive authority over his sentence. The inmate is severely disadvantaged with respect to any litigation pending at the time of his transfer, since transfer will generally necessitate termination of existing attorney-client relationships with obvious potential for adverse effect and prejudice.[11/]

Should the transferee be able to afford the services of an attorney in the receiving state, such an attorney is not likely to be versed in the law of the sentencing state. Moreover, such an attorney remains subject to discretionary practices of the sentencing courts which

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11/ See the Code of Professional Responsibility, E.C.2-32, which requires attorney considering termination to evaluate the potential for such effects.

could deny him an opportunity to present the case altogether. Leis v. Flynt, 439 U.S. 438 (1979) (per curiam).

The state prisoner in a remote federal prison does not have access to resources within the prison which would allow him to secure meaningful access to state courts on his own. Federal prison law libraries do not provide even the most basic state law materials, 12/ nor are they requred to under existing department policies. 13/ The Federal Bureau of Prisons simply does not undertake to provide transferred inmates access to their state courts, viewing it instead as a responsibility of the sending state. 14/

In summary, the facts of involuntary out-of-state transfer show a pervasive, anti-rehabilitative effect on the inmate and a devastating impact on his family.

12/Telephone conversation between Paul Zieff, assistant to counsel for amici, and Mr. Lloyd Hooker, Bureau of Prisons Law Librarian, Central Office, February 27, 1981.

13/U.S. Department of Justice, Federal Prison System: Inmate Legal Service(General Counsel, No. 1315.3. July 16, 1979, Attachment 1: Law Library Materials).

14/Telephone conversation between Paul Zieff and Merry Wilburn, Bureau of Prisons, General Counsel's Office, February 27, 1981.

III. Argument

A. INVOLUNTARY INTERSTATE TRANSFER OF A STATE PRISONER TO FEDERAL PRISON IS CRUEL AND UNUSUAL PUNISHMENT AND VIOLATES THE EIGHTH AMENDMENT.

As evidenced by the studies noted above, depriving a man of his family by transporting him against his will to a distant prison is cruel. Not only cruel, it is highly unusual. It is a punishment which "has no fellow in American legislation." Weems v. United States, 217 U.S. 349, 377 (1910).

From the very birth of this nation, the punishment of those committing crimes against the Colony, and later the State, has been viewed as something which ought to take place wholly within the sentencing court's jurisdiction. This tradition has deep roots in the English common law and remains firmly embedded in the collective conscience of the American people. A brief glimpse at the historic underpinnings of this tradition is instructive and demonstrates just how "unusual" these tranfers are.

The starting point for any such analysis must be the English Habeas Corpus Act of 1679, 31 Car.II, c.2, "one of the fundamentals of English liberty."[1/] The Act specifically prohibited any transfer of a prisoner, even within the county, absent a writ of habeas corpus or some other legal writ.[2/] More to the point, the Act also flatly prohibited transport of the prisoner for confinement outside of the jurisdiction.[3/] The Habeas Corpus Act was in large part a response to, and reaction against, the practice know at the time as "transportation," whereby

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1/ A. Carpenter, Habeas Corpus in the Colonies, 8 AM. HIST. REV. 18, 21 (1902).

2/ Transfer would also be allowed in the event of fire, trial elsewhere in the county, or judicial order to a common jail. See Section IX of Act, attached to this brief as Appendix B.

3/ Section XII. "...No subject of this realm that now is or hereafter shall be an inhabitant or resiant of this Kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas. . ." See Appendix B for full text of Section XII.

convicted prisoners were removed to faraway penal colonies.[4]

The English Habeas Corpus Act was adopted either verbatim[5] or in some

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[4] The first Parliamentary authorization of transportation occurred in 1597. Political and religious prisoners were frequent transports, as the practice provided "a convenient way of ridding the country of their sedition and turbulence." W. Johnson, English Prison Hulks, 2 (1957). The Habeas Corpus Act went into partial remission in 1717 when Parliament passed 4 Geo. I, c.11 which provided for transportation as a penalty for certain offenses. Criminals were transported to Australia, Tasmania, Norfolk Island, Africa and the American colonies. F.H. Wines, Punishment and Reformation: A Study of the Penitentiary System, 163 (1910). The American colonies bitterly resented the practice. Id., at 163. The last English transport ship crossed the ocean to Western Australia in 1867, and "this system at long last came to a welcome end." R. Hinde, The British Penal System, 93 (1951). "Transportation of men against their will has always been executed at a terrific social cost." H. Barnes and N. Teeter, New Horizons in Criminology, 295 (2d ed. 1959). "[T]he annals of the practice are among the darkest stains on a supposedly civilized culture. It was one of the most repulsive phases of human activity in dealing with criminals . . . Transportation has proved a ghastly failure wherever it has been tried." Id., at 305.

[5] South Carolina, Public Laws, S.C. 330 (1712); Georgia, Digest of the Laws of Georgia 1700-1796; North Carolina, N.C. Revised Laws, 1821.

modified form,[6] by eleven of the thirteen original states. As new states joined the Union, they often incorporated anti-transportation provisions into their habeas corpus acts.[7]

As a practical matter, these anti-transportation provisions were hardly necessary to protect American prisoners. Punishment of crime was from the outset thought to be a local concern and incarceration outside of the state was not practiced.[8] It is not surprising then that a number of the explicit anti-transportation sections were dropped during pre-civil-war revisions of the habeas corpus acts.[9] Research into the

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[6] New York, N.Y. Laws of 1787, c. 39; New Jersey, Laws of New Jersey, 1795; Delaware, Del. Laws, c. 4 §10 (1793); Maryland, Laws of Md. c. 126 §5 (1809); Pennsylvania, Pa. General Laws, c. 73 §12 (1785); Virginia, Laws of Virginia, c. 53 §7 (1792); Rhode Island, Act. Laws of R.I., 1798 at 232; Massachusetts, Acts and Resolves of 1784, c. 72 §§9 and 10.

[7] E.g., Maine, Laws of Maine 1822, c. 64 §11; Vermont, Act. Vermont Laws 1814, c. 7 §25.

[8] Wines, op. cit., supra 180, n.5. See also D. Rothman, Discovery of the Asylum (1971).

[9] E.g., Mass. Revised Statutes, c. 111 §32 (1836).

history of the period suggests no reason for deletion other than the revisor's natural inclination to excise purely vestigial language.[10/] A number of states, however, have retained explicit anti-transportation language.[11/]

Accordingly, the amici argue that the

10/ Research made available to the amici suggests no other reasons. For example, a thorough study of the revision of the Massachusetts Act including contemporary newspapers and literature, concurrent legislation and court decisions, was unable to uncover a hint that repeal was the result of any legislative policy. The researchers also consulted a legal historian and an expert in American penological history: neither could suggest any reason aside from the observation that in the context of the times the provisions were not needed.

11/ E.g.
Ariz. Rev. Stat. Ann. §31-472 (1956).
Ark. Stat. Ann. §43-2607 (1977).
Cal. Penal Code §2911 (West Supp. 1970-1979).
Ga. Const. of 1877, art. I, §2-118 (1976).
Ill. Rev. Stat. c.65, § 29 (Smith-Hurd 1959) (amended 1979).
Kan. Stat. Ann. §21-4609 (1974).
Note: This provision authorizes transfers of prisoners intrastate. There is no authority for shipping prisoners out of state, but no specific prohibition.
See also Kan. Const. of 1859, Bill of Rights, §12 (1972).
Note: The original language of 1859 read:

(cont.)

(Fn. cont.)

"No person shall be transported from the state for any offense committed within the same, and no conviction in the state shall work a corruption of blood or forfeiture of estate." The amended version of 11/7/1972 reads: "No conviction within the state shall work a forfeiture of estate." However, the original intent of the Constitution may be in force, especially when examining the statutory authority given to the correctional authorities only for transferring intrastate.

Md. Ann. Code,Art.27 §618 (1976).

Neb. Const., Art.I, §15.

N.D. Cent. Code §32-22-36 (1976).

Ohio Rev. Code Ann. §2725.25

Ohio Const., Art.I, §12.

S.C. Code, §17-13-120 (1977). Note: §17-13-120 specifically prohibits transfer of prisoners ("shall not be removed... unless"). But see Vice v. Harvey, 458 F. Supp. 1031 (D. S.C. 1978), a case which amici suggest may have been wrongly decided.

S.D. Codified Laws Ann. §24-2-1; §24-2-25; §24-1-5; §24-6-4; §24-6-6 (1979). Note: These various provisions of S.D.C.L.A. specifically direct the correctional authorities who receive convicted prisoners to where they shall place them and when they may be moved to other facilities within the state. §24-1-5 authorizes the state to contract with the U.S. for support and care of U.S. prisoners within the S.D. penitentiary. There is no authorization for transfer of state prisoners to other states or to the federal government.

W. Va. Const., Art.III, §5.

practice of transportation -- or, in this modern day, the shipout policy under consideration in the instant case -- is irreconcilable with the common law tradition of this country and with what, indeed, were by the middle of the 19th century "the evolving standards of decency that mark[ed] the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). The shipout policy, as practiced, is banishment, "a fate universally decried by civilized people." Trop v. Dulles, supra, at 102. Indeed, as one judge has observed:

> "To be cast outside the jurisdiction within which one was sentenced is often to be separated from rights, privileges, and standards otherwise available -- to become to some degree, a 'man without a country.'" Gomes v. Travisono, 490 F.2d 1209, 1217 (1st Cir. 1974) (Campbell, J., concurring) vacated, 418 U.S. 909, cert. den., 418 U.S. 910, aff'd as modified, 510 F.2d 537 (1974).

A man in exile at least remains free to come and go as he cares to, albeit perhaps not in the state of his choice. Yet exile has been universally condemned as an unreasonable punishment. E.g. State v. Doughtie, 237 N.C. 368; 74 S.E. 2d

922 (1953); Ex Parte Scarborough, 76 Cal. App.2d 648, 173 P.2d 825 (1916). The cruelty of exile is obviously many times greater if it must be suffered in prison.

Life in prison is barren and painful, and often all that gives meaning to a prisoner's existence is the time and the love he shares with his family. To rob him of that is a "punishment more primitive than torture," Trop v. Dulles, supra, 356 U.S., at 102.

It may be neither cruel nor unusual to force a man who has wronged to give up his freedom. To force him to give up his family is both cruel and unusual. It is nothing less than the "gratuitous infliction of suffering," Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion of Stewart, Powell and Stevens, J.J.) and "offensive to cardinal principles for which the Constitution stands." Trop v. Dulles, supra,at 102.

Amici urge this court to hold modern day "transportation" -- the shipout policy -- unconstitutional under the Eighth Amendment.

B. INVOLUNTARY INTERSTATE TRANSFER OF A STATE PRISONER TO A FEDERAL PRISON, WITHOUT AFFORDING HIM PROCEDURAL SAFEGUARDS AND A DEMONSTRATION OF A COMPELLING STATE INTEREST, VIOLATES THE FOURTEENTH AMENDMENT.

1. Family Integrity

a. A prisoner has a fundamental liberty interest in maintaining reasonable contact with his family.

Transfer of a state prisoner to federal prison separates him from his family by hundreds if not thousands of miles. The practical effect of such a transfer, unlike a transfer to another prison within the state, is to eliminate any opportunity for the family to spend time together. This disruption of the family unit substantially impairs well-established rights of the transferee as well as those of other members of his family.

The relationship between a parent and his child is constitutionally protected. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S.

510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972). As this Court noted in Stanley v. Illinois, 405 U.S. 645 (1972), a father's interest in the companionship of a child is "cognizable and substantial." 405 U.S., at 652. "The private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection." Id., at 651.

While the parent's right to participate in, and direct the upbringing of, a child, recognized in Meyer, Pierce and Yoder is not absolute, limitations on it have been approved by this Court only if imposed to promote the welfare of the child, or to accommodate the child's conflicting interest. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (conviction of child's guardian under child labor law, upheld), Parham v. J.R., 442 U.S. 584 (1979) (parents' power to commit child to mental hospital, not unlimited); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (blanket parental consent requirement for child's

abortion, unconstitutional). In the present context there is no conflict between the inmate's and the child's interest, and indeed it is commonly accepted that destruction of the parent-child bond is extremely harmful to the child.

The relationship between husband and wife, "an association for as noble a purpose as any involved in . . . prior decisions [of this Court]" is also constitutionally protected. Griswold v. Connecticut, 381 U.S. 479, 486 (1965). See also Loving v. Virginia, 388 U.S. 1 (1967).

The most essential and basic element of this well-established right to family integrity is the "right of the family to remain together." Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (due process required before mother can be deprived of children by the state). See also Moore v. East Cleveland, 431 U.S. 494 (1977) (reversing conviction under housing ordinance, effect of which was to prohibit extended family from sharing home); Stanley v. Illinois, supra. Clearly, transfer of the state inmate to a distant federal prison, which effec-

tively forecloses the possibility of family visits, substantially impairs the fundamental rights of the prisoner and others in his family.

The fundamental right to family integrity, which is so severely affected by transfer to a remote federal prison, has already been recognized in the prison context by lower federal courts. For example, in Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977), the court concluded that complete curtailment of visitation would violate the inmates' First Amendment rights to familial association and communication, as well as the Eighth Amendment right to be free of cruel and unusual punishment. 437 F. Supp., at 322. Moreover, restrictions on an individual's visitation were viewed as a deprivation of liberty within the meaning of the due process clause of the Fourteenth Amendment which would require procedural protections. Id. See also Ramos v. Lamm, 485 F.Supp. 122, 150, 162 (D. Col. 1979) (restriction on visitation which is protected by First, Ninth and Fourteenth amendments, will be valid only if it furthers important

government interest and is not unnecessarily broad); Mabra v. Schmidt, 356 F.Supp. 620, 631 (W.D.Wis. 1973); Agron v. Montayne, 392 F.Supp. 454, 456 (W.D. N.Y. 1975); Avi v. Gibson, 483 F.Supp. 1102, 1123 (D.V.I. 1979); Rhem v. Malcolm, 371 F.Supp. 594, 625 (S.D.N.Y. 1974).

Accordingly, the law seems clear that a person, including a prisoner, has a fundamental interest in maintaining reasonable contact with his family, and that for a prisoner this interest is sustained through visitation. Indeed, no less a voice than the Chief Justice's recently called for "generous family visitation in decent surroundings to maintain family ties."[1/] It is equally clear from the facts that the possibility of such visitation is irreparably fractured by involuntary interstate transfer into the federal system.

[1/] Annual address of Hon. Warren E. Burger to American Bar Association, February 1981.

b. A prisoner may not be deprived of his fundamental interest in family contact without being afforded procedural due process.

The amici contend that the State should not be permitted, constitutionally, to deprive a prisoner of his family contacts by transferring him out of state without first giving him clear notice of its intent and the reasons therefor and an opportunity to be heard, wherein he may confront and question those reasons and have a fair chance of persuading the hearing authority not to allow the shipout. Such procedural safeguards have been required by this Court in other situations where the fundamental interest of family integrity is involved.

This Court has made clear, for instance, that the Constitution requires that appropriate procedural protections be provided before a parent who has abused or neglected a child may be deprived of the child's custody. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (dictum). See also Stanley v. Illinois,

405 U.S. 645, 658 (1972). If such a parent, who has in some sense committed a crime against his child, merits procedural protection before being deprived of the child, certainly an inmate who has not so acted should be entitled to as much.

In Procunier v. Martinez, 416 U.S. 396 (1974), a case involving prison censorship of personal letters written by both prisoners and their families and friends outside the walls, this Court required that the First Amendment interest be accorded "minimum procedural safeguards" against error and arbitrariness. 416 U.S., 417-419.

Most significantly, in Vitek v. Jones, 445 U.S. 480 (1980), decided last term, involving the State's claimed right to transfer a prisoner to a mental hospital, the Court held that even a convicted prisoner retained a "residuum of liberty" not to be stigmatized or subjected to qualitatively different deprivations of liberty in a mental hospital and was thus entitled to a pre-transfer due process hearing. 445 U.S., at 491, 494.

Amici emphasize that the prisoner's fundamental interest in family integrity, on which they base their argument that the prisoner has a right to a pre-transfer hearing, is an independent constitutional right. Its existence does not depend on whether or not there is a relevant federal or state statute creating an entitlement or a legitimate expectation to stay in one state prison rather than another. Thus this case is distinguishable from Meachum v. Fano, 427 U.S. 215 (1976) and Montayne v. Hames, 427 U.S. 236 (1976), where the absence of such a separate statute was held fatal to prisoners protesting their intrastate transfers.

Similarly, though the harm to prisoners subjected to interstate transfer is plainly a "grievous loss," it is not that characterization -- held unavailing to the prisoners in Meachum and Montayne -- which gives rise to the right. The right to family integrity arises from the Constitution itself. Vitek v. Jones speaks of the prisoner's "residuum of liberty", and amici contend that the prisoner's family inte-

grity is part of that residuum, requiring procedural protections before it may be compromised.

Several factors considered to be of significance by this Court in Vitek, are also relevant in the present context and support a similar result here. Specifically, the opinion in Vitek notes that transfer to a mental hospital will result in a "massive curtailment of liberty"; that it may "engender adverse social consequences . . . [with a] . . . very significant impact on the individual"; and that the interests affected are "among the historic liberties protected by the Due Process Clause." 445 U.S., at 491, 492.

Certainly transfer to a federal prison results in as complete a curtailment of certain historically protected liberties as does transfer to a mental hospital, and the personal and social consequences to the individual, although different, can be just as disastrous. One can easily imagine how an inmate might choose to remain near his loved ones and within reach of state courts albeit in a mental hospital, than be shipped across the country to a

remote federal prison.

Whatever hostility and resentment is engendered by involuntary transfer, it is many times multiplied by denying the affected individual an opportunity to be heard. Improving the decision-making process by providing a pre-transfer hearing will not deprive prison officials of needed discretion in evaluating the facts as found. Since an erroneous decision needlessly imposes great hardship on the inmate, fairness requires that he have an opportunity to correct inaccurate information and to provide additional relevant data, whatever the asserted justification for the transfer. Moreover, the potential infringement to First Amendment rights, as demonstrated by the recent Massachusetts experience (supra, pp.8-10), suggests that only such a hearing can hope to insure that the asserted justification is the real justification. What Justice Frankfurter stated some thirty years ago in another context is no less true today in the face of an administrative decision to ship a prisoner out of state:

> "The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking, and self righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-172 (1950) (concurring).

A pre-transfer hearing is needed not only to enhance the reliability of the fact determination process, but should also prove helpful in considering the dispositional alternatives available. Should highly unusual circumstances be deemed to justify transfer outside of the state, it is necessary to give careful consideration to each alternative, including other in-state facilities or those of neighboring states. A thorough canvassing of these alternatives will help prison officials accomplish legitimate objectives without upsetting the inmate's life and those of his loved ones any more than is necessary.

Finally, according the prisoner due process also furthers the correctional interest in rehabilitation. As the Chief Justice noted with respect to parolees in Morrissey v. Brewer, 408 U.S. 471 (1972):

> "Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocation will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S., at 482.

These words ring no less true when applied to a prisoner facing exile to the federal system.

c. At a pre-transfer due process hearing there must be a demonstration of a compelling state interest.

Much as the due process hearing should be the forum where the prisoner can seek to question and rebut the State's case for transfer, so it should also be the forum for the State to assert its justification. And the amici urge

that the standard which the State should meet should not be mere reasonableness, but that there be a substantial, indeed compelling, State interest in shipping the prisoner into the federal system. If he is to be deprived of his fundamental right to family integrity, the State's need should be no less.

In Procunier v. Martinez, 416 U.S. 396 (1974), this Court considered the proper standard to be applied to mail censorship regulations in a prison context. Noting that protected rights of "free citizens" were abridged by the censorship practice, the Court refused to base the standard of review on any "assumptions about the legal status of prisoners." 416 U.S., at 409. In order to derive the proper standard of review the opinion referred to earlier decisions, outside of the prison context, dealing with the problem of incidental restrictions on First Amendment liberties. Id.

The regulations under consideration in Procunier v. Martinez were held invalid under the standard gleaned from these earlier, non-prison, First Amend-

ment cases. To survive review under this standard a censorship regulation will have to further "an important or substantial government interest" and may not restrict protected rights any more than "necessary or essential." Id., at 413.

Amici urge that the Court take the same approach in this case with respect to the rights of the prisoner's wife and children to family integrity. Under the standard applied in the family integrity cases, it is clear that transfer should not be carried out unless required by a compelling state interest. Roe v. Wade, 413 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965). Moreover, in order to ensure that impairment of protected rights be no broader than necessary (Roe, supra, at 155; Griswold, supra, at 485), amici urge that transfer,even where called for, should be to the closest suitable facility.

2. Access to Courts

a. A prisoner has a fundamental liberty interest in access to the courts.

As explained in some detail in the Facts section of this brief, supra, pages 16-17, a state prisoner shipped to a distant federal prison is effectively deprived of any meaningful access to the courts with authority over his sentence. Contact with his attorney is substantially diminished if not terminated and is not replaced by contact with another equally versed in the state law under which he was sentenced. Nor does he have access to materials needed to research the state law on his own while in the federal prison.

Yet, it is well-established that a prisoner has a fundamental constitutional right to "adequate, effective and meaningful" access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977). It is, perhaps, his most precious right, for without it "all other rights . . . are illusory." Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973).

As this Court noted in Johnson v. Avery, 393 U.S. 483 (1969), prisoners' access to the courts for the purpose of presenting their complaints "may not be denied or obstructed." 393 U.S. at 485. In Johnson, a regulation barring inmates from furnishing legal assistance to other prisoners was held unenforceable, where there was no adequate alternative assistance available. As this Court said in Procunier v. Martinez, 416 U.S. 396 (1974), in that part of the case involving the ban on law student or paralegal interviews with prisoners, inmates must have a "reasonable opportunity to seek and receive the assistance of attorneys, ... and practices that unjustifiably obstruct the availability of professional representation . . . are invalid." 416 U.S., at 419.

Similar impediments to access have been removed by other decisions of this and lower federal courts. See, e.g., Ex Parte Hull, 312 U.S. 546 (1941) (regulation requiring that habeas corpus petitions be reviewed by prison officials held invalid); Adams v. Carlson, supra, (prison officials enjoined from

requiring attorney-client interviews to occur by phone in partitioned room).

b. A prisoner may not be deprived of such access without a due process hearing and a demonstration of a compelling state interest.

The cases on prisoner access to the courts speak in absolute terms, suggesting that the effective cutting-off of that access, which interstate shipouts produce, is prohibited altogether. Indeed, amici assert that such ought to be the law,and that involuntary interstate transfers should be likewise prohibited.

But if this Court is not inclined to extend the absolutism of Bounds and similar cases to the context of interstate transfers, amici urge that, before any such transfer take place, the prisoner's right of effective access to the courts should entitle him, at the very least, to a due process hearing at which there is a convincing showing by the State that the need to transfer the prisoner supervenes the right.

There are no cases on this point

which counsel could find. But the analysis used in Vitek v. Jones, discussed supra, pp.32-34 involving a transfer to a mental hospital, seems apt. If the prisoner is to have part of his "residuum of liberty" trenched upon, he should at least have the protection of procedural safeguards against error or arbitrariness. And the State should have to show, in that particular case, why there is no reasonable alternative to the proposed transfer into the federal system.

IV. Conclusion

For the reasons stated, amici urge that this Court reverse the decision below and hold unconstitutional the involuntary interstate transfer of state prisoners into the federal system; or, in the alternative, vacate the decision and remand this case to the Second Circuit for consideration in light of the constitutional issues necessarily implicated in interstate transfer of prisoners.

Respectfully submitted,

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Counsel gratefully acknowledges the assistance of Harvard Law Student Paul Zieff in the preparation of this brief.

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS SENATE
STATE HOUSE, BOSTON

SENATOR JACK H. BACKMAN
SECOND MIDDLESEX-NORFOLK DISTRICT
TEL. 727-7295

CHAIRMAN
COMMITTEE ON HUMAN SERVICES
AND ELDERLY AFFAIRS

CHAIRMAN
COMMITTEE TO INVESTIGATE SECLUSION,
RESTRAINT AND DEATHS IN
STATE SUPPORTED FACILITIES

TO: Senator Jack H. Backman, Senate Chair,
Joint Committee on Human Services &
Elderly Affairs

FROM: S. Brian Willson, Staff Assistant

RE: Factual Findings & Analysis
Relating To Survey of Massachusetts
State Prisoners Shipped To Other
State and Federal Prisons During
Calendar Year 1980

DATE: February 9, 1981

PART 1. FACTUAL FINDINGS--OUT OF STATE PRISONER TRANSFER QUESTIONNAIRE

In November of 1980, a questionnaire was sent to 19 Massachusetts prisoners who had been transferred out of state during 1980. The information below summarizes what these questionnaires revealed about the procedures and circumstances surrounding these transfers.

1. None of the 19 men asked or wanted to be transferred.

2. At the time of the transfers, all of the men were incarcerated in Walpole, but in various locations within that institution.

3 men were in Block 10 (Departmental Segregation Unit)
1 man was in Block 9 (Protective Custody)
4 men were in Maximum Security Blocks
11 men were in Minimum Security Blocks

3. Though 12 of the 19 men had received disciplinary tickets (for alleged violation of various prison rules, virtually all minor and nonviolent in nature) in the 6 months prior to their being shipped out, 7 men had not received any disciplinary reports in that 6-month period. The breakdown of the nature of the disciplinary tickets for the 12 men:

3 for contraband (1 marijuana cigarette, a 1" piece of steel, and benedril)
4 for participation in peaceful demonstrations against prison practices
1 for yelling for law library access
1 for refusing to cooperate with a rectal search
1 for several charges which were dismissed
2 for unknown reasons

4. At the time the transfers were initiated, none of the 19 men were given any official or unofficial notice of any kind as to why or to where they were being moved. Seventeen of the men indicated that they explicitly requested information about what was happening to them.

The general response to these inquiries was: "We don't know, we are just obeying orders."

5. None of the 19 men had participated in any hearings or discussions before or with any board, panel or official relating to the reasons for the shipments prior or subsequent to the transfers. That remains the case today.

6. Fourteen men requested permission to inform members of families or friends about the transfers before they left Massachusetts. None of the men were allowed to do this.

7. The method utilized in shipping the men generally could be described as follows: The men, ordered by guards in early morning or late evening hours to be handcuffed, chained, and shackled in their cells, were escorted to station wagons for the journey, usually one man per car accompanied by 2 guards. Guards did not provide reasons or identify destinations, either voluntarily or in response to the men's inquiries. The cars stopped for gas at some point where the men were escorted cuffed, chained and shackled to the men's room and subsequently provided 2 bologna sandwiches and kool aid. Destination reached several hours later, the men were immediately confined to segregation at the new prison.

8. Once at their new locations outside Massachusetts, they were allowed to call collect to a contact person, but not without considerable delay in many cases:

7 men were able to contact a family member or friend within 24 hours of their transfer
8 men had contact only after several days
4 men had contact only after more than a week had elapsed

9. The transfers have created serious problems for these men; among those cited are:

interference with parole plans and development of community ties;
inability to adequately address grievances with Mass. officials;
no more visits;
detrimental effect on family's health;
breakup of marital relationships--one man has 7 children;
school work stopped;
no programs available at new prisons;
interruption of mail service;
the threat of violence in the new prison;
no opportunity to accumulate good time;
disruption of their access to courts, legal materials and lawyers

10. The individuals shipped out of Massachusetts were or had been involved in numerous programs and activities while at Walpole:

religious groups (Christian Action Group, Catholic Discussion Group, etc.)
educational programs (both college and GED)
therapy and rehabilitation (AA, Association for the Reduction of Violence, Self-Awareness, etc.)

special interest groups (Irish-American Heritage Group, Black Caucus, Vietnam Vets, etc.)
social action groups (Race Relations, Big Brothers, Reach Out Youth Counseling, etc.)
political groups (National Prisoners' Rights Association, Norfolk Inmate Council, etc.)

11. Thirteen of the 19 men transferred have civil suits pending against the Dept. of Correction. Another man was in the process of preparing a complaint. All 19 now indicate that they no longer have any access to Mass. legal materials or adequate access to their own or other lawyers.

12. Transfers occurred during 1980 in three separate shipouts--Feb. 16, Aug. 12 and Sept. 12 to:

Federal Bureau of Prisons:

Lewisburg, PA.	6	(400 miles from Boston)
Leavenworth, Kan	3	(1600 miles from Boston)
Marion, Ill.	3	(1400 miles from Boston)
Terre Haute, Ind	3	(1200 miles from Boston)
Lompoc, Calif.	1	(over 3000 miles from Boston)

New Hampshire State Prison 1
Rhode Island State Prison 2
TOTAL
19 prisoners

13. It is worthwhile to note the responses of some of the men when they were asked why they felt they were transferred out-of-state.

"A purely vindictive action for my speaking out against the brutality inflicted upon prisoners in Cell Block 10 at Walpole."

"Personally, I feel the 'move' was political I had access to all ethnic groups in the prison and I was respected by many. I was a leader who the 'authorities' couldn't/can't buy."

". . . because I knew too much and had influence on my peers."

" . . . because of the suit I have pending against the D.O.C. and because of my being a part of exposing the injustices in Walpole."

"Because of my legal work, group involvement, and ability to motivate and create group participation. I make programs work--Walpole administration refuses/fails to create, maintain any viable programs. - - - All of the peacemakers and prisoners who use leadership in a positive manner are being removed from Walpole."

PART II. ANALYSIS--RELATING TO RESULTS OF OUT OF STATE PRISONER TRANSFER QUESTIONNAIRE

Department of Correction Acting Commissioner Louis Berman in a letter to Senator Jack Backman explained that transfers were for prisoners (1) for whom Massachusetts did not have safe or adequate maximum security facilities, (2) who presented "Management" problems, or (3) who simply might do better elsewhere.

Massachusetts has very severe maximum security facilities--as secure if not more so than most facilities of other states and the Federal Bureau of Prisons. There are no apparent special treatment programs being administered to any of the transferred prisoners at their new facilities.

With 11 of the men having been housed in the minimum security blocks at Walpole just prior to transfer, it does not seem that those men had posed security or management problems there. Furthermore, in the 6 months prior to their transfers, 7 had received no disciplinary tickets, and for the other 12 men who had received tickets, the results indicated they were virtually all for petty, minor and nonviolent infractions or were dismissed altogether. There were and are now no known pending criminal charges against any of the men for crimes committed in the prison (or outside the prison).

Thus, if the men were considered special management problems, it is not evident from their particular location in prison housing units or their prison disciplinary records.

Perhaps the Department considers these prisoners "management" problems due to their activities as litigants and respected leaders

among the captive population. Thirteen of the men had their own suits pending against the Department of Correction. Many of these men also helped prepare legal materials for scores of other prisoners. Not only did the transfers remove them from Massachusetts legal materials but it also removed them from access to hundreds of other prisoners in need of these services as "in-house" legal counselors.

Furthermore, most of those shipped (at least 14) had been involved in various activities as leaders among the prisoners in programs, associations, work assignments and in public and political efforts to improve conditions at Walpole.

Thus, it is evident that the men shipped were and are articulate leaders within the prisoner population and that their removal seems to be a management tool for assuring absolute control rather than one of eliminating "management" problems. More significant is the fact that these prisoners were exercising their rights to petition the courts for peaceful resolution of grievances and their Constitutional rights to speak out in a nonviolent manner against injustices, many of them violent, being perpetrated upon them by prison officials. Nonviolent behavior of prisoners in Massachusetts is severely punished, even to the extent of exile. An old prison maxim says: "No good deed goes unpunished."

Such shipments, in addition to effectively shutting off the capability of rights of petition, has a brutal effect on the social and family relationships, and subsequently on both the psychological and physical health of family members and prisoners alike.

It might be instructive to make reference to the Report of the Attorney General (of the state of New Mexico) on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico, Part II, issued September, 1980, especially as to the effect of prison officials attempting to maintain absolute control through destruction of prisoner leadership and participation roles.

"The early 1970s was a time of relative order at the Penitentiary of New Mexico - - - partly the result of a series of formal and informal incentives which were used by the administrators to motivate inmates to accept and cooperate in the orderly operation of the institution - - - During the late 70s, many of the formal and informal incentives were removed by a new administration. The result was a forced reliance on coercion as the primary method of inmate control.

"We only stay in control of prisons to the degree that the prison population as a whole sees our administration as fair, humane, somewhat reasonable, something they can understand . . . The primary factor leading to the February, 1980 riot was the disruption of incentive controls over inmates. The removal of incentives undermined inmates' self-interest in keeping order and disrupted the non-violent power sources of convict leaders - - - The curtailment of most programs--formal incentives--eliminated a major source of nonviolent convict power - - - - As the inmate society grew more violent, it fragmented into small self-protective cliques with no strong central leadership - - - - The arbitrary and excessive use of segregation soon exhausted its value as a disciplinary tool because inmates felt they had little to lose and much to gain by disobeying rules. The need for an alternative coercive control fostered the practice of manipulating informants as a means of control.

"The abrupt change in inmate society coincided with administrative and staff upheaval at the Penitentiary."

Governor Jerry Apodaca brought in 2 veterans of the federal prison system to run the Penitentiary in 1975. They "attempted to tighten security at the prison by restricting programs."

(pp 5-6, Part II of Report)

"A staff member described the change that he observed: '(Before 1975) I could just about identify the different cliques and different powers. There was an inmate code where inmates respected boundaries . . . The federal wardens had no respect for the inmate powers that be. They had no respect for their ways - - - - so they started breaking things up left and right which created an imbalance.'"

(pp 29-30, Part II of Report)

APPENDIX B

Extracts from Habeas Corpus Act of 1679, 31 Car. II, c. 2

IX. Provided always, and be it enacted by the authority aforesaid, That if any person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers, whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; (2) unless it be by habeas corpus or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol; (3) or where any person is sent by order of any judge of assize or justice of the peace, to any common work-house of house of correction; (4) or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; (5) or in case of

sudden fire or infection, or other necessity; (6) and if any person or persons shall after such commitment aforesaid make out and sign, or counter-sign any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes or signs, or counter-signs such warrant or warrants, as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offense respectively, to be recovered in manner aforesaid by the party grieved.

XII. And for preventing illegal imprisonment in prisons beyond the seas; (2) be it further enacted by the authority aforesaid, that no subject of this realm that now is, or hereafter shall be an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his Majesty, his heirs or successors; (3)

that every such imprisonment is hereby enacted and adjudged to be illegal; (4) and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment. . . .

CERTIFICATE OF SERVICE

I, Ernest Winsor, Esq., counsel of record for the above named amici curiae, certify that on March 11, 1981 I served the above brief on all parties in the case by mailing postage prepaid, first class, copies thereof to each of their counsel of record, as follows:

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Respondent, William French Smith, Attorney General of the United States	Hon. Wade H. McCree, Jr. Solicitor General, U.S. Dept. of Justice 5143 Main Jus- Building 10th and Constitution Aves. Washington D.C. 20530
Respondent, Commissioner of Corrections, State of Vermont	Peter M. Nowlan Ass't. Att. Gen. Dept. of Corrections, State of Vermont 103 South Main St.

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